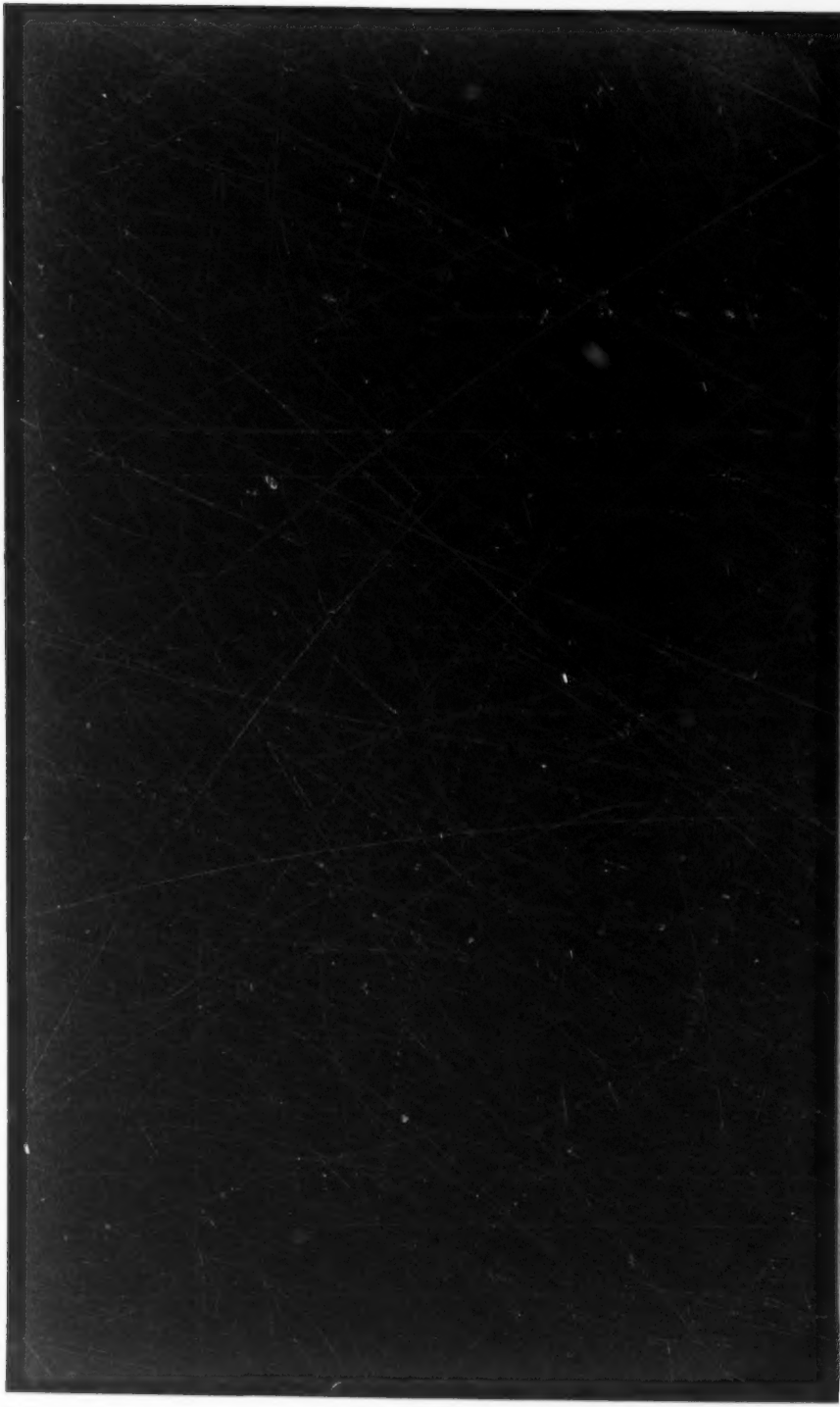

# Supreme Court of the United States

## OCTOBER TERM, 1902.

*No. 84.*

JOSEPH H. BEALS, PLAINTIFF IN ERROR,

*v.*

JAMES J. CONE ET AL., DEFENDANTS IN ERROR.

*To the Honorable the Judges of said Court:*

The Hon. C. S. Thomas has furnished me a copy of further citations which he has submitted to the court in the above-entitled cause. I have serious doubts as to the propriety of this practice; but as it has been adopted by Mr. Thomas, it would seem to me proper that I should comment upon this new matter.

When an application for patent is made, an adverse claimant has two remedies: (1) He may protest against the issuance of the patent on the ground that the applicant has not complied with the law (R. S., sec. 2325), or (2) he may file an adverse claim and support that by a suit (*id.*, sec. 2326). In one case the issues are tried by the law depart-

ment; in the other by a court. The findings and adjudications of each tribunal, in the exercise of its jurisdiction, are binding upon the other.

By virtue of the act of Congress we filed a protest against the application for a patent. One of the grounds of protest was that the applicants had not discovered a vein, etc. A hearing was ordered. A summons was served upon the parties, in which the issues were distinctly set forth. We were called upon "to respond and *furnish testimony* concerning the said allegations" (Ex. M, Record, pp. 165, 166). The duties and burdens of a party to the controversy were thus devolved upon us. We prosecuted the case through the department at our own expense. We were allowed to take an appeal from the decision of the local land officers, thus further recognizing us as a party.

We conducted these protest proceedings to protect our own conflicting claim. The defeat of the application gave us another chance. It enabled us to be in court in this cause.

This cause embraces some issues not involved in the other. One issue tried and adjudicated in the protest case was as to whether a discovery had been made in the Ophir shaft prior to October 11, 1893. That *identical issue* came up again in this cause. The only reason given by the supreme court of Colorado as to why the determination of that issue by the Land Department was not binding upon the court was that we appeared as *amicus curiæ*. This seems to be too technical and too untrue.

A person may appear in the department as *amicus curiæ*. He does so appear when he has no interest and assumes no burdens. When a person not interested, by letter or affi-

davit, gives the department information to be acted upon by the department, and is not called upon to prosecute the case, it may well be said that he appears as *amicus curiæ*.

It must have appeared before the department that we were interested, for, otherwise, we would not have been allowed an appeal. Our plea of *res judicata* shows how we were interested. Mr. Morrison says: "A protestant claiming an interest is allowed the right of appeal (8 L. D., 122; 16 *id.*, 532; 29 *id.*, 230). But if he has no such interest he is regarded as a mere *amicus curiæ* and has no such right (8 L. D., 439). A party having no surface conflict is not such a party in interest as to have the right to appeal (6 L. D., 318; 19 *id.*, 356). Nor has a party whose only claim is by location made after the protest was filed (19 L. D., 356)" (Mor. Min. Rights, 10th ed., page 428).

The fact that we could not have our rights to our conflicting claim affirmatively adjudicated in the protest case does not establish the further fact that we were not interested, or were not a party. The fact that judgment in this case may embrace more than the judgment in the protest case did, has no bearing upon the effect of the judgment in that proceeding so far as it went. It was *res adjudicata* of the *facts found and determined* notwithstanding a court, in the suit at bar, might be required to find other facts in order to enter a final judgment; and this would be true even though the cause of action was different, which it is not, for in both cases the original proceeding is an application for a patent for the same ground (Southern P. R. Co. *v.* United States, 168 U. S., 1).

It follows that the principle relied on by Mr. Thomas as-

serted by his additional citations cannot affect the cause as it stood at the time it was submitted.

Very respectfully, H. B. JOHNSON.

[Endorsed:] #84. In the Supreme Court of the United States. Joseph H. Beals, plaintiff in error, *v.* James J. Cone *et al.*, defendants in error. Reply to additional citations by Mr. Thomas. H. B. Johnson, attorney for plaintiff in error.

No. 84.

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No. 300.

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IN THE

Filed Oct. 21. 1901.

# Supreme Court

OF THE

## UNITED STATES.

October Term, 1901.

JOSEPH H. BEALS,
*Plaintiff in Error,*

v.

JAMES J. CONE AND
LYMAN ROBISON,
*Defendants in Error.*

APPLICATION FOR SUPERSEDEAS.

H. B. JOHNSON,
*Attorney for Plaintiff in Error.*

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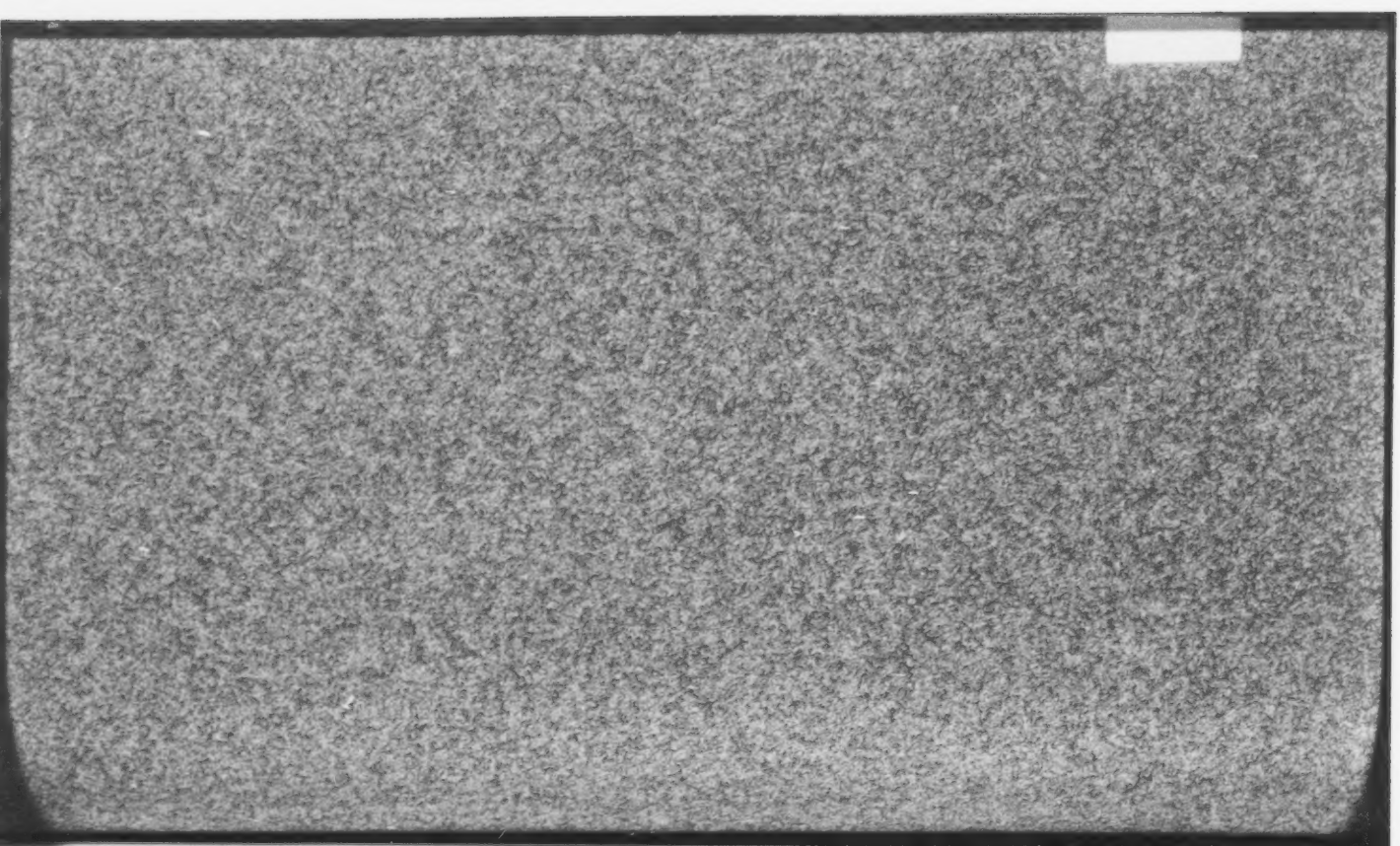

IN THE

# Supreme Court

OF THE

## UNITED STATES.

October Term, 1901.

JOSEPH H. BEALS,
*Plaintiff in Error,*

v.

JAMES J. CONE AND
LYMAN ROBISON,
*Defendants in Error.*

No. 300.

### APPLICATION FOR SUPERSEDEAS.

Now comes the plaintiff in error in the above entitled cause, and moves the Court to enter an order that the writ of error heretofore issued in the above entitled cause shall operate as a supersedeas, for reasons more particularly specified in his affidavit filed herewith.

H. B. JOHNSON,
*Attorney for Plaintiff in Error.*

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|---|---|
| Joseph H. Beals, *Plaintiff in Error*, v. James J. Cone and Lyman Robinson, *Defendants in Error.* | No. 300. October Term, 1901. |

**Affidavit for Supersedeas.**

**Joseph H. Beals,** being duly sworn, on oath says that he is the plaintiff in error in the above entitled cause; that the judgment of the Supreme Court affirming the judgment of the lower court was rendered on June 4, 1900; that a petition for a rehearing was filed which was overruled on November 19, 1900; that an order withholding a remittitur was entered on December 17, 1900; that said last mentioned order was revoked on June 17, 1901; that in his application for a writ of error he applied, also, for a supersedeas; that he subsequently renewed his said application before Mr. Justice Brewer, tendering a supersedeas bond in the sum of $2500; that defendants in error have taken possession of the shafts, drifts and other workings of plaintiff in error, constructed by plaintiff in error at an expense of about $15,000, and is now extracting ore from the ground in dispute and converting the same to their own use; that at the time plaintiff in error was allowed an appeal from the trial court to the Supreme Court of Colorado, he was required to give and did give an appeal bond in the sum of $500, and defendants in error have instituted an action on said bond; that defendants in error have obtained a Receiver's receipt for the ground in controversy and are attempting to obtain a United

States patent therefor, and that all of these proceedings, on the part of the defendants in error, have been taken since the writ of error in this cause was served upon them.

And affiant further states that he is a man of limited means having invested and expended nearly all he has in the property in controversy, and cannot give a very large *supersedeas* bond, but thinks he can give one that will be ample to cover any damages which may result from the allowance of a *supersedeas* herein.

JOSEPH H. BEALS.

Sworn and subscribed before me this
day of , 1901.

[SEAL.] JUNE A. MOWER,
*Notary Public.*

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**BRIEF IN SUPPORT OF APPLICATION.**

A *supersedeas*, allowed at this time, would probably not restore plaintiff in error to the possession of his shafts and other workings on the property in dispute, or stop the extraction and conversion of the substance of the estate, by defendants in error; but it would, we think, defeat the suit on the appeal bond and permit the issuance of a patent.

To obtain relief in regard to the working of the property an injunction might be necessary, and a bond would have to be given for that purpose.

The mere delay in obtaining a patent, and in recovering upon an appeal bond in the sum of $500, would cause but very trifling damage; and to

cover this, we hereby tender a *supersedeas* bond in the sum of $2,500, and ask that the same be approved and a *supersedeas* allowed.

We also present ten copies of the printed brief which we used on our application for a writ of error, so that, if the Court is disposed to consider the question as to whether the writ was properly allowed, it will have before it the same showing as that which was made before Mr. Justice Brewer on which the same was allowed.

It may be doubted whether defendants in error had the legal right to proceed with their application for a patent after a writ of error to this Court had been allowed, even though no *supersedeas* had been allowed. The act of Congress (Revised Statutes, Sec. 2326) contemplates that when an adverse claim is filed and a suit brought thereon the application for a patent "shall be stayed until the controversy shall have been settled or decided by a Court of competent jurisdiction." It is made the duty of the adverse claimant to prosecute his suit with reasonable diligence "*to final judgment.*" After "*such judgment*" has been rendered the party entitled to the possession of the claim can present the record and obtain a patent. Can a judgment be said to be final within the meaning of this act when a writ of error is pending in this Court to reverse it? Irrespective of how this question might, upon consideration, be resolved, it is certain that the issuance of a patent would greatly complicate the proceedings necessary to enforce the rights of plaintiff in error. It is equally certain that if a *supersedeas* is allowed by this Court the Commissioner of the

General Land Office would withhold the patent until the cause had been determined by this Court. If this Court reverses the judgment herein, and remands the cause for a new trial, it will certainly be a great hardship upon plaintiff in error to find that, in the meantime, a patent for the property in dispute has been issued to defendants in error.

It would, also, be a great hardship upon plaintiff in error to be required to pay damages upon an appeal bond, at this time, in view of the fact that the judgment may be reversed, and, upon another trial, a final judgment may be entered in his favor.

A notice that this application will be submitted for the consideration of this Court on October 21, 1901, has been duly served and filed herein.

H. B. JOHNSON,

*Attorney for Plaintiff in Error.*